No. 76-1470

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

STANLEY M. ROSENBLUM, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITIONERS' REPLY MEMORANDUM

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The Memorandum in Opposition filed by the Solicitor-General is somewhat surprising in its total lack of understanding of the procedural background of this case. Repeatedly the Solicitor argues in point 1 (Memorandum in Opposition, pp. 2-3) that Petitioners failed to introduce *evidence* or *proof* that the fund in question belonged to Petitioners, or that Petitioners had any "property interest" in the seized funds. But this

case never reached the stage where evidence or proof was adduced; a government motion to dismiss was sustained on the pleadings alone. Therefore, the Complaint in the district court below is the only source of factual material now before this Court, and the allegations therein are presumptively true for the present purpose of determining the assertion of a valid cause of action.

That Complaint does allege a specific property interest by Petitioners in the seized fund, by virtue of their prior contract with the taxpayers, to support Petitioner's claim. The real issue, of course, is whether that property interest is superior (by virtue of taxpayers' due process rights) to the claim and seizure of Internal Revenue Service. It is this issue which the government really avoids, and instead seeks affirmance of the decision below on technical procedural grounds which are unjustified by the record.

Sooner or later the government must come to grips with the real substantive issue in this case: is a levy and seizure "wrongful" if it totally deprives a taxpayer of the financial ability to hire effective counsel to resist the I.R.S. claims? Each court below recognized this as a difficult and vexing problem which must ultimately be resolved, and the instant case presents a perfect opportunity for such resolution.

The government's discussion of the Anti-Injunction Act, 26 U.S.C. 7421(a) is plainly irrelevant. No claim is made in the instant case that this is a taxpayer suit coming under the exceptions to that Act. This is solely and exclusively a suit under Section 7426, to which the 7241(a) provisions are specifically inapplicable.

Petitioners agree with the opinion below insofar as it holds that taxpayers have no right to representation by a particular law firm for a particular fee. But this does not, as the government suggests, militate against the instant cause of action. The

district court, once a trial is granted, could hear evidence and make specific findings as to the nature and complexity of the representation, the degree of expertise required for the proper legal representation of taxpayers, whether or not Rosenblum has the requisite competency for such representation and the reasonable fees for same. Petitioners agree that the fee contracted for must bear some reasonable relationship to the legal services required to be rendered and must not constitute a device or subterfuge for denying the government the benefits of its jeopardy assessment. But in any event, this is a matter which could easily be adjudicated below. The prime issue, however, is whether the seizure of *all* assets, precluding payment of *any* attorney fee (and thus the representation of effective and competent counsel), is "wrongful" as violative of due process under the Fifth Amendment (no Sixth Amendment issue being involved here) and subject to redress by means of the instant action.

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